FOR ARGUMENT

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IN THE

Supreme Court of the United States

October Term, 1979

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., et al.,
Petitioners,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

General Telephone Company of the Northwest, Inc. (GTNW) believes the earlier briefs filed on behalf of petitioners adequately rebut the arguments of the Equal Employment Opportunity Commission (EEOC) set forth in Respondent's Brief, but we will provide a limited response to certain points.

A quick overview of what was admitted by the EEOC, and what was not denied, assists in focusing on the critical issue. The EEOC admits (with our comments in parentheses): (1) the issue is limited to one of statutory interpretation (Resp. Br. 19); (2) a §706 action normally is

triggered by a charge filed by a private party (Resp. Br. 9); (3) the EEOC has discretion in deciding which cases to litigate under §706(f)(1) (while this discretion may assist the EEOC in its statutory role, once the action is filed it does not provide a basis for non-compliance with Rule 23) (Resp. Br. 10 n.3); (4) the EEOC does not have standing to bring suit beyond either the issues raised by the charging party, or which another private party could raise as discovered during the investigation (the effect of which is limited to avoiding having to administratively process the charge by the second party) (Resp. Br. 13); (5) a private party filing a class action under §706(f)(1), 42 U.S.C. §2000e-5(f)(1), must comply with Rule 23 of the Federal Rules of Civil Procedure (Congress intended that the EEOC similarly comply) (Resp. Br. 17); (6) Congress has made the EEOC "a properly suing party" for class actions under §706(f)(1) (which overcomes the class membership requirement under Rule 23) (Resp. Br. 21); (7) associations bringing class actions are governed by Rule 23 (the EECO acts in an analogous manner) (Resp. Br. 22); (8) the relief available for either a private party class action or an EEOC class action is governed by §706(g), 42 U.S.C. §2000e-5(g) (Resp. Br. 19); (9) without application of Rule 23, absent class members are not bound by the judgment in an EEOC class action under §706(f)(1) (Resp. Br. 20, 34); and (10) if this Court concludes, as GTNW contends, that Rule 23 applies to EEOC class actions under §706(f)(1), the EEOC will seek compliance with Rule 23 (Resp. Br. 25).

By omission, the EEOC does not deny that it is bound by the Federal Rules of Civil Procedure in Title VII actions, that superseding of these rules by Congress must clearly

appear and that the legislative history does not clearly show an intent to exempt EEOC class actions under §706(f)(1) from Rule 23 (it tacitly concedes this latter point) (Resp. Br. 26).

The EEOC fails to list any substantial burdens or difficulties in complying with Rule 23, or any substantive effect upon its ability to protect the public interest. Moreover, the EEOC does not deny the significant benefits which Rule 23 brings to litigation of this type. Instead the EEOC asks this Court to sanction a case-by-case equitable remedy approach to overcome the procedural problems it admits will occur by not complying with Rule 23 (Resp. Br. 35).

GTNW contends the express and implied concessions of the EEOC, and the reasons previously advanced on behalf of petitioners, compel the conclusion Congress intended, in enacting the 1972 amendments to Title VII, that the EEOC comply with Rule 23 when it files a class action under §706(f)(1).

ARGUMENT

1. The Present Action is a "Class Action" and Has Been Characterized as a Class Action Throughout This Litigation

The EEOC seeks to re-phrase the issue before the Court and to re-characterize the action as something other than a class action. But as this action has proceeded through the lower courts, it uniformly has been characterized as a class action and no attempt to change the terminology makes it any less of a class action.[1]

1. The EEOC, two weeks after it amended the complaint, moved to bifurcate "the issue of *class* liability from the issue of individual damages" (emphasis added) (A. 12) and continually characterized the action as a "class action" in its supporting memorandum (A. 14-19). (In describing this motion to bifurcate in Respondent's Brief, the EEOC said it

The Court should not be detracted from the substance and character of this litigation by the EEOC's subtle efforts to change the terminology in order to provide a better setting for its subsequent argument.

2. The EEOC's Standing Does Not Decide the Application of Rule 23

The EEOC cites a series of cases for the principle that it promotes the public interest and has authority to sue under §706(f)(1) beyond the claims of the individual charging party (Resp. Br. 8-13). But the public interest is also promoted by private actions under §706. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974); *EEOC v. D. H. Holmes*, 556 F.2d 787, 792 n.7 (5th Cir. 1977), *cert. denied*, 436 U.S. 962 (1978). The EEOC cannot bring suit in its own name for any injury to it. Normally a private party files a charge, which the EEOC investigates and attempts to conciliate. If the conciliation efforts are unsuccessful, all that the lower courts have said is that the EEOC has "standing" to bring "a civil action"[2] for all unlawful practices discovered during its investigation. For example, if the civil action includes unlawful practices discovered while investigating the charge filed by the first party, and not alleged by that party, the courts merely have held the EEOC has standing to bring suit on them. The justification is that this avoids the unnecessary administrative delay in requiring a second party to file a charge on these additional unlawful practices and in processing this second charge. The EEOC then stands both in the shoes of the first party and the second party, but no further. If these two parties brought a joint class action under §706(f)(1) they would have to comply with Rule 23. Therefore, when the EEOC brings a §706(f)(1) action in their stead it too should comply with Rule 23.

"moved for an order bifurcating the issue of liability from the issue of individual damages" (Resp. Br. 3), conveniently omitting the reference to "class" prior to "liability.") The magistrate phrased the issue as being "whether the EEOC is required to comply with Rule 23 in order to bring suit on behalf of a class" (Pet. App. A-26). The court of appeals also characterized this as "a §706 class action brought by the EEOC." *EEOC v. General Tel. Co.*, 599 F.2d 322, 332 (9th Cir. 1979) (Pet. App. A-20). In *EEOC v. Page Engineering Co.*, 17 Fair Empl. Prac. Cas. 1638, 17 Empl. Prac. Dec. ¶8603 (N.D. Ill. 1978), the EEOC brought a §706 action and the defendant moved to dismiss the class action allegations in the complaint. The district court noted: "The EEOC *concedes* that it intends this suit to be a *class action* but argues that the provisions of Rule 23 of the Federal Rules of Civil Procedure are not applicable to actions brought by the EEOC." 17 Empl. Prac. Dec. at 7095 (emphasis added).

2. Section 706(f)(1). The EEOC also mentions the general authority granted it under §706(a), 42 U.S.C. §2000e-5(a), in support of certain arguments throughout its brief. But §706(a) also states that this general authority is limited "as hereinafter provided," which refers not to a general mandate to the EEOC to sue whenever and however it desires, but to the specific statutory scheme for charges, processing, conciliation and then, and only then, "a civil action" per §706(f)(1).

3. Our Issue Concerns the Procedure By Which the Litigation Will be Pursued—It Does Not Concern the Remedy

After re-characterizing the issue and the type of action it is pursuing under §706(f)(1), the EEOC relies heavily upon *Porter v. Warner Holding Co.*, 328 U.S. 395, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946), for its subsequent argument. The reliance is misplaced.

Porter v. Warner Holding Co. "concerned . . . the *power* of a federal court" to provide a remedy under its equitable jurisdiction. 328 U.S. at 396 (emphasis added). The case did not concern procedure in general, much less Rule 23 or class actions per se, and it preceded our present Rule 23 by 20 years. The scope of the "remedy" which a court can provide under its equitable jurisdiction in §706(f)(1)

actions is not our issue, as it was in *Porter*. Congress has been very specific in describing the remedies available, which are set forth in §706(g).[3]

The Emergency Price Control Act of 1942 described in *Porter v. Warner Holding Co.*, and various other statutory enactments referenced by the EEOC,[4] were enacted by Congress for specific purposes and with unique procedures for each, just as was Title VII. It is difficult to compare these various statutory procedures with Title VII due to these differences, with one important exception—in none of the other statutory schemes can the government bring suit on behalf of a class and bind the employer/defendant to the individual relief granted absent members of the class if the government prevails, but not bind these members if the employer/defendant prevails, which is what the EEOC seeks to do under §706(f)(1).[5]

4. The Legislative History Supports Conclusion that Rule 23 Applies to EEOC §706(f)(1) Actions

The EEOC's conclusion about the proper interpretation of the legislative history of Title VII is improperly premised upon *Porter v. Warner Holding Co., supra.* There was no

3. Section 706(g) is set forth at Pet. App. A-39 and A-40. It permits injunctive relief, reinstatement, hiring, back pay "or any other equitable relief as the court deems appropriate."

4. Resp. Br. 11 n.5, 14 n.8 and 18 n.13.

5. For example, a specific written consent form for each party-plaintiff is the procedure under both the Fair Labor Standards Act, 29 U.S.C. §216(b), and the Age Discrimination in Employment Act, 29 U.S.C. §626; Rule 23-type class actions are unavailable. *LaChapelle v. Owens-Illinois*, 513 F.2d 286 (5th Cir. 1975); *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859 (9th Cir. 1977). If the government brings suit under the FLSA or ADEA, the right of individual employees to bring an action, or to become a party-plaintiff to an action, is terminated. This type of fairness to the employer, finality and elimination of further litigation is the similar benefit which application of Rule 23 will bring to EEOC class actions.

traditional (and limited) rule that government class actions initiated by an individual charging party were not covered by the Federal Rules of Civil Procedure; there were merely various congressional enactments unique in themselves with regard to the purpose for which they were enacted and the statutory procedure which Congress selected. Congress described the "remedy" for Title VII in §706(g), but the new *procedure* under the 1972 amendments was to increase the enforcement power of the EEOC by permitting it to also sue under §706(f)(1) in accordance with the normal rules of court. See Petitioners' Brief at 12-14. This limited rule concept argued by the EEOC was not relied upon by the court of appeals below, nor by the various district courts either.[6]

The Congressional history was extensive and clear that the court-enforcement approach was adopted so the EEOC would *not* be "the prosecutor, the judge and . . . the executioner," but instead there would be "a hearing according to the rules of procedure . . . before impartial judges rather than biased crusaders."[7] Instead what we have under the decision by the court of appeals is the situation where two

Under the National Labor Relations Act, 29 U.S.C. §151 *et seq.*, only the Board can prosecute an unfair labor practice; there is no separate cause of action by individuals for damages, such as lost wages, due to an employer's unfair labor practices. *Amalgamated Utility Workers v. Consolidated Edison*, 309 U.S. 261, 269-70, 60 S. Ct. 561, 565, 84 L. Ed. 738 (1940); *Schatte v. Intl. Alliance*, 182 F.2d 158, 166 (9th Cir. 1950), *cert. denied*, 340 U.S. 827, *reh. denied*, 340 U.S. 885 (1950).

6. These cases are set forth in Petitioners' Brief at 9 n.3. The three exhaustive law review articles noted therein reviewed the legislative history in detail and never suggested Congress ever considered this concept in giving the EEOC authority to sue under §706(f)(1), nor did any of those articles even cite *Porter v. Warner Holding Co., supra.*

7. EEOA Legislatory History at 1661. See Petitioners' Brief at 12 n.14 and 13.

of the most critical decisions in the lawsuit, which Congress intended the courts should make as they traditionally have done under Rule 23, have been made by the EEOC, i.e., that the lawsuit should proceed as a class action, and what the scope of the class should be. In other words, the EEOC has usurped the class certification responsibility of the court; this was not what Congress intended.

5. Application of Rule 23 to EEOC Class Actions Will Benefit the Parties and the Courts

Requiring the EEOC to comply with the class certification requirements of Rule 23 will benefit it, employers, employees and the courts by providing definition to the class, delineating its scope, preventing piecemeal and multiple litigation, ensuring res judicata effect with a settlement or decision, and by better judicial control. There are no great barriers for the EEOC to overcome. The strong public policy reasons behind Rule 23, which make adherence to it in Title VII litigation indispensable,[8] apply equally to EEOC class actions under §706(f)(1).[9] Similar class actions under §706(f)(1) are successfully handled daily by private parties with much less expertise, experience and resources than the EEOC, and it will be able to do likewise in accordance with the intent of Congress.

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8. See *East Texas Motor Freight System Inc. v. Rodriguez*, 431 U.S. 395, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977), where Mr. Justice Stewart, speaking for an unanimous Court, stated:

> We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law or fact are typically present. *But careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable.*

431 U.S. at 405 (emphasis added).

9. As the district court concluded in *Local 194 v. Standard Brands*, 74 C 0587, Slip. Op. at 16 (N.D. Ill., December 6, 1979):

> The Court finds no justification for distinguishing between private actions and EEOC actions under §706 under the *Rodriguez* rule.

CONCLUSION

The decision by the court of appeals should be reversed.

March 18, 1980.

Respectfully submitted,

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